80156-8

CASE NO. 247392

JULIE SCHONDER

RESPONDENT

VS

DEBORAH THOEN, ET VIR, ETAL

APPELLANTS

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY
Case No. 03-2-02492-3
Judge Salvatore Cozza

BRIEF OF RESPONDENT JOLIE SCHONDER

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3. *Home v. N. Kitsap Sch. Dist.*, 92 Wash. App. 709, 965 P.2d 1112 (1998).

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STATUTES

None.

OTHER AUTHORITIES

1. ER 401
2. ER 403
3. ER 904
4. ER 1002
5. ER 1003

I.
ASSIGNMENT OF ERROR

The Appellant has cited six "Assignments of Error" as a result of Respondent receiving a favorable verdict at trial. The Appellant's assignments of error are as follows:

1. The testimony of Defendant and Defendant's witness should not have been precluded regarding the industry standard of providing information to and getting signed acknowledgements from one about to undergo permanent cosmetic procedures. (Appellant's Brief pp. 1)

2. The testimony of Defendant and Defendant's witness should not have been precluded regarding the fact that they did in fact provide said information to Plaintiff and did in fact obtain Plaintiff's signature on said forms. (Appellant's brief at page 1)

3. The testimony of Defendant and Defendant's witness should not have been precluded regarding the fact that said forms were kept at the Defendant's witness's shop and disappeared about the same time, Plaintiff, who was an employee of witness left that job. (Appellant's brief at page 1)

4. The Defendant should not have been precluded from offering her proposed exhibits (which were insigned copies of the documents Defendant and Defendant's witness would have testified were signed by the Plaintiff) in furtherance of Defendant's claim of Plaintiff's Assumption of the Risk. (Appellant's brief at page 1)

5. By precluding the above evidence the court ruled that it was too prejudicial to Plaintiff. The withholding of said evidence from the jury was just as prejudicial to the Defendant. (Appellant's brief at page 1)

6. All the precluded evidence would have been helpful to the jury as the finder of fact and should have been allowed as such. (Appellant's Brief pp. 1)

The argument below addresses the above Assignments of Error currently before this Court. The trial court's decision to grant the Respondent's motion in limine excluding the unsigned pre-injury release form and related testimony is not an abuse of the trial court's discretion, and should not be disturbed.

II.
STATEMENT OF THE CASE

This matter arose out of permanent cosmetic procedure preformed by the Appellant on November 11, 2001. (C.P. 4) The Appellant was acting as the supervisor/trainer of the permanent cosmetic procedure performed on the Respondent. (C.P. 4) The aforementioned procedure was preformed on the Respondent despite the fact that the Appellant was not qualified to train or supervise the procedure. (C.P. 4) As a result of the permanent cosmetic procedure, the Respondent suffered pain, an unsightly appearance, disfigurement, scarring, and significant infection on her face and lips. (C.P. 4-5)

The Respondent brought suit against the Appellant on April 15, 2003, and received a favorable verdict on October 6, 2005. (C.P. 1-8, C.P.

24) As a result of the verdict in favor of the Respondent, the Appellant appealed the Trial Court's decision. (C.P. 30-35, C.P. 36-41) The basis of the Appellant's appeal stems from the trial court's decision to grant the Respondent's motion in limine excluding the Appellant's proposed exhibit and testimony regarding an unsigned pre-injury release form. (R.P. 16-24)

At the time of trial, the Appellant attempted to admit into evidence an unsigned pre-injury release form. (R.P. 16-24) The Appellant claimed that the unsigned pre-injury release form was to represent a similar form previously signed by the Respondent prior to the cosmetic procedure being preformed on the Respondent by the Appellant. (R.P. 16-24) The Appellant argued that the Appellant would testify, as would a defendant previously released from the suit, that the Respondent signed the same pre-injury release form prior to the cosmetic procedure. (R.P. 16-24)

The Respondent objected to the admission of the unsigned pre-injury release form, and submitted a motion in limine seeking to exclude the document as well as any testimony related to the document or existence. (R.P. 16-24) The Respondent argued that the document was not timely submitted to the Court pursuant to ER 904, that the Respondent had never signed a pre-injury release form, and that pre-injury release forms excluded negligent conduct are invalid under Washington State Law. (R.P. 17)

After reviewing the Respondent's motion in limine, and hearing oral argument from all parties, the trial court granted the Respondent's

motion in limine excluding the unsigned pre-injury release form and all related testimony. (R.P. 21-22) The trial court found that the Appellant had failed to meet the foundational and authentication requirements necessary to submit the document. (R.P. 21) The trial court also found that any testimony related to the unsigned pre-injury release form was self-serving. (R.P. 21)

This matter nowcomes before this Court on appeal as a result of the trial court granting the Respondent's motion in limine regarding the unsigned pre-injury release form. (C.P. 30-35 & C.P. 36-41)

III.
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE RESPONDENT'S MOTION IN LIMINE.

A. STANDARD OF REVIEW

Whether or not to grant a motion in limine is within the trial court's discretion. *Garcia v. Providence Medical Center*, 60 Wash. App. 635, 642, 806 P.2d 766 (1991) A trial court's decision to grant a motion in limine will only be reversed in the event there is an abuse of discretion. *Id. at 642*; *See Also, Fenimore v. Donald M. Drake Constr. Co.*, 87 Wash.2d 85, 91, 549 P.2d 483 (1976) "A trial court abuses its discretion only when its ruling was based upon untenable grounds or untenable reasons." *Medcalf v. The Department of Licensing*, 83 Wash. App. 8, 16, 920 P.2d 228 (1996) More simply, a trial court's decision to grant a motion in limine will only be reversed "if no reasonable person could have so ruled." *Id at 16.*

B. APPELLANT'S ASSIGNMENTS OF ERROR ARE WITHOUT MERIT AND THE TRIAL COURT'S DECISION TO GRANT THE RESPONDENT'S MOTION IN LIMINE EXCLUDING EXHIBITS AND TESTIMONY REGARDING AN UNSIGNED PRE-INJURY RELEASE FORM WAS JUSTIFIED AND WAS NOT AN ABUSE OF DISCRETION.

1. The Trial Court Did Not Abuse Its Discretion By Granting the Respondent's Motion In Limine.

Whether or not to grant a motion in limine is solely within the trail court's discretion. *Garcia v. Providence Medical Center*, 60 Wash. App. 635, 806 P.2d 766 (1991) A trial court must exclude evidence "when its probative value is outweighed by the potential that the evidence will unduly prejudice the other party or confuse the jury." *Garcia, 60 Wash. App. at 642, 806 P.2d 766* (1991); *ER 403* (2006).

In the present action, the Appellant attempted to submit an **unsigned** pre-injury release form for the purpose of showing that the Respondent signed a similar form, and to allow the Appellant to offer testimony that it was her common practice to have patients signs such a form. (R.P. 16-24) The Respondent objected to the admission of the unsigned pre-injury form into evidence, and offered a motion in limine seeking to exclude the unsigned pre-injury release form, as well as any testimony related to the unsigned pre-injury release form. (R.P. 16-24)

Upon presentation of the Respondent's motion in limine, and after hearing oral argument from both parties, the trial court granted the Respondent's motion in limine. (R.P. 16-24) In granting the Respondent's motion in limine the trail court stated:

It seems to me that, in the absence of something pretty definite here, what we are dealing with is a certain amount of speculation as to where the original signed copy may or may not have gone. It injects kind of an odd aspect into the case as to the control of such document. It would seem to me that, really, you know, the defendant, I would view, had a responsibility to maintain such a document. It is in their interest to do so.

Really, in my view, to have the injection of an unsigned document which is supported only by what I would view as being self-serving testimony of a defendant and a former released defendant in the case I would think would be insufficient to even meet the foundational requirement to permit that to come in.

So leaving aside the other issues, I think just as a matter, you know, of authenticity and basic foundational requirement, I am not satisfied that those can be met. And for those reasons, I would exclude them. (R.P. 21-22)

As stated above, a trial court must excluded evidence "when its probative value is outweighed by the potential that the evidence will unduly prejudice the other party or confuse the jury." *Garcia, 60 Wash. App. at 642, 806 P.2d 766* (1991); *ER 403* (2006). It is clear that the admission of an unsigned pre-injury release form as proof that the Respondent signed a similar document is highly prejudicial; especially where the Appellant could not produce an actual signed document, and the only testimony supporting that a pre-injury release form was signed by the Respondent would come from the Appellant. In this instance, it was well within the trial court's discretion to exclude an unsigned pre-injury release form and related testimony. In fact, the trial court could not have come to any other reasonable conclusion.

2. **Not Only is the Appellant's Unsigned Pre-Injury Release Form Prejudicial to the Respondent, The Form Itself is Invalid, As Under Washington State Law Negligent Conduct Cannot be the Subject of a Pre-Injury Release.**

Under Washington law, the release of negligent conduct cannot be the subject of a pre-injury release. *Vodopest v. MacGregor*, 128 Wash.2d 840, 861, 913 P.2d 779, 789 (1996). Specifically, the Supreme Court of Washington held, **"[w]e wish to be very clear that it is only negligent conduct which cannot be the subject of a preinjury release."** *Vodopest, 128 Wash.2d at 861, 913 P.2d at 789* (1996) (emphasis added).

At the trial the issue was whether Appellant's negligent conduct caused the Respondent's injuries. (C.P. 1-8 & C.P. 9-23) While exculpatory clauses in pre-injury release forms may be enforced under Washington Law, it is clear that negligent conduct cannot be the subject of a pre-injury release form. *Vodopest, 128 Wash.2d at 861, 913 P.2d at 789* (1996) Thus, under Washington Law the Appellant would not have been able to offer a signed pre-injury release form to shield her from liability stemming from her negligent conduct, let alone an unsigned pre-injury release form. *Id.*

Therefore, the trial court did not abuse its discretion in granting the Respondent's motion in limine excluding an unsigned pre-injury release form purporting to release the Appellant from her own negligent conduct.

3. Using the Appellant's Own Cited Authority it is Clear that the Trial Court Did Not Abuse Its Discretion By Granting the Respondent's Motion in Limine.

In the Appellant's own brief, authority is citied stating that before a court can submit the defense of assumption of risk to the jury there must be substantial evidence in the record supporting that defense. *Klein v. R.D. Werner Co., Inc.*, 98 Wn.2d 316, 318, 654 P.2d 94 (1982) Further, the Appellant's own brief cites authority that there must be proof that the Respondent knew of and appreciated the specific hazard which caused the injury. *Home v. N. Kitsap Sch. Dist.*, 92 Wash. App. 709, 965 P.2d 1112 (1998).

Using the Appellant's own brief, it is clear that the trial court did not abuse its discretion by granting the Respondent's motion in limine. At trial there was no proof offered that that Respondent signed the pre-injury release form, nor was there substantial evidence in the record to allow the trial court to submit the defense of assumption of risk to the jury. Using the case law cited in the Appellant's own brief, the trial court exercised its discretion to exclude the unsigned pre-injury release form and related testimony in accordance with Washington State Law.

4. The Washington Evidence Rules Prohibit the Admission of the Appellant's Unsigned Pre-Injury Release Form.

The unsigned pre-injury release form the Appellant attempted to admit into evidence at trial is completely irrelevant. (R.P. 16-24) ER 401 defines "relevant evidence" as:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *ER 401* (2005).

In the case at present, the Respondent did not sign a pre-injury release form prior having permanent cosmetics procedure. (R.P. 17) As such, an unsigned pre-injury release does not make the existence of a fact more probable than not. The fact is the Respondent never signed a pre-injury release form, and the admission of an unsigned document of the same effect does not make that fact more probable or less probable. The unsigned pre-injury release form is completely irrelevant in this matter.

The pre-injury release form was also properly excluded under ER 403 because the probative value of the pre-injury release form was substantially outweighed by the danger of unfair prejudice to the Plaintiff, confusion of the issues, and the pre-injury release form would have mislead the jury. *ER 403* (2005).

Further, ER 1002 requires that the original writing be submitted as evidence in order to prove a writing. *ER 1002* (2005). Under ER 1003, a duplicate is admissible to the same extent as the original unless "(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." *ER 1003* (2005).

It is clear from the facts presented at the time of trial that there was a dispute as to the authenticity of the original, as the trial court excluded the unsigned pre-injury form on that basis. (R.P. 21-22) Further, would

have further been unfair to admit a duplicate, in this case an unsigned document, in the place of the original document.

Under the circumstances, it is clear that the trial court did not abuse its discretion by granting the Respondent's motion in limine excluding the unsigned pre-injury release form and related testimony.

IV.
CONCLUSION

In order for a trial court's decision to grant a motion in limine to be reversed, this Court must determine that no reasonable person could have ruled the way the trail court ruled in this matter. *Medcalf v. Department of Licensing*, 83 Wash. App. at 16, 920 P.2d at 232. Clearly it was not an abuse of discretion for the trial court to decide to exclude an unsigned pre-injury release form that would have released the Appellant of liability for her negligent conduct in opposition to Washington State Law.

The Respondent never signed a pre-injury release form prior to having the permanent cosmetic procedure, and the Appellant did not offer any evidence, other than an unsigned document, to prove otherwise. It is not only clearly within the trial court's discretion to excluded evidence that is not authentic, contrary to Washington State Law, and extremely prejudicial to the Respondent, but it is the trial court's duty to decide so.

DATED this 29th, September, 2006.

AXTELL & BRIGGS

Brad Axtell, WSBA# 17451